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In *Stringfellow's of New York, Ltd. v. City of New York*,[1] the New York Court of Appeals upheld the constitutionality of New York City's adult entertainment zoning ordinance.[2] In a unanimous decision written by Judge Vito Titone,[3] the court ruled that the City's ordinance does not violate the freedom of expression guaranteed by Article I, Section 8 of the New York State Constitution.[4] The court found that the City ordinance represents "a coherent regulatory scheme designed to attack the problems associated with adult establishments"[5] and that it properly balances community needs and free expression.[6] This Case Comment analyzes the doctrinal bases of the court's decision, and argues that the court failed to give meaningful protection to free speech interests.

Municipalities across the nation have employed their zoning powers to regulate the locations of establishments offering sexually explicit materials to promote the quality of life of their communities.[7] Some municipalities have sought to concentrate the sex shops in specific geographical areas, usually in industrial and commercial zones.[8] Others have adopted

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1. 694 N.E.2d 407 (N.Y. 1998).

2. *See id.* For other commentary about the New York City ordinance and the decision of the New York Court of Appeals, see Herald Price Fahringer, *Zoning Out Free Expression: An Analysis of New York City's Adult Zoning Resolution*, 46 BUFF. L. REV. 403 (1998); Albert Fredericks, *Adult Use Zoning: New York City's Journey on the Well-Traveled Road from Suppression to Regulation of Sexually Oriented Expression*, 46 BUFF. L. REV. 433 (1998).

3. Chief Judge Judith S. Kaye took no part in the decision. *See* 694 N.E.2d at 421.

4. N.Y. Const. art. I, § 8 provides in part that: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

5. *Stringfellow's of New York, Ltd. v. City of New York*, 694 N.E.2d at 417.

6. *Id.* at 415 (referring to New York Constitution's "proper balance between community needs and free expression").

7. *See* Town of Islip v. Caviglia, 540 N.E.2d 215 (N.Y. 1989).

8. *See, e.g.*, City of Renton v. Playtime Theatres, 475 U.S. 41 (1986).

so-called "anti-skid row" ordinances, which are designed to prevent red light districts from developing by dispersing the sex shops throughout the municipality.[9] The New York City zoning law at issue in *Stringfellow's* has aspects of each of these two types of ordinances. First, it generally relegates adult establishments to manufacturing and commercial zones.[10] Second, "[w]ithin those districts where adult uses are authorized, the adult establishment must be located at least 500 feet from schools, houses of worship, day care centers, other adult uses and zoning districts where new residential development is allowed."[11]

The court based its decision in *Stringfellow's* on three major precedents: the Supreme Court decisions in *Young v. American Mini Theatres, Inc.*[12] and *City of Renton v. Playtime Theatres*[13] and the New York Court of Appeals decision in *Matter of Town of Islip v. Caviglia*.[14] In *Young*, the Court held that Detroit's ordinance, which dispersed adult theatres throughout the city, did not violate the First Amendment.[15] In *City of*

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9. *See, e.g.*, Young v. American Mini Theatres, 427 U.S. 50 (1976).

10. The ordinance defines "adult establishments" as "those commercial enterprises in which a 'substantial portion' of the premises are used as an 'adult book store,' an 'adult eating or drinking establishment,' an 'adult theatre' or 'other adult commercial establishment.'" *Stringfellow's*, 694 N.E.2d at 412-13 (citing Amended Zoning Resolution § 12-10). Covered facilities are those that emphasize entertainment "characterized by an emphasis on 'specified anatomical areas.'" *Id.* The city guidelines interpreted "substantial portion" to mean that, except under certain exceptional situations, at least 40 percent of accessible floor space must be for adult use, or at least 40 percent of the establishment's merchandise must be comprised of adult materials, in order for the establishment to be considered an adult establishment. The Court of Appeals held that the City must follow the literal provisions of its own written guidelines. City of New York v. Les Hommes, 1999 W.L. 1215136 (N.Y. Dec. 20, 1999). The mere fact that an adult establishment admits minors does not free the establishment from the city ordinance. *See* City of New York v. Stringfellow's of New York, 684 N.Y.S.2d 544, 549-50 (1st Dep't 1999).

11. *Stringfellow's*, 694 N.E.2d at 413 (citing Amended Zoning Resolution § 32-01 [b]; § 42-01 [b]).

12. 427 U.S. 50 (1976).

13. 475 U.S. 41 (1986).

14. 540 N.E.2d 215 (N.Y. 1989).

15. "Specifically, an adult theater may not be located within 1,000 feet of any two other 'regulated uses' or within 500 feet of a residential area." *Young*, 427 U.S. at 52.

Renton, the Court upheld the City of Renton's attempt to concentrate adult theatres by prohibiting them from being located "within 1,000 feet of any residential zone, single or multiple family dwelling, church, park, or school."[16] In *Matter of Town of Islip*, the New York Court of Appeals, in a four-three decision, held that the Town of Islip ordinance limiting adult establishments to industrial districts does not violate the free speech clauses of either the United States or the New York State Constitutions.[17] In each of these cases, the court found that: (1) the municipal regulation of adult establishments was not content-based discrimination, because the predominant purpose of the regulation was to combat the harmful secondary effects of adult establishments; and (2) the municipality left open ample locations where adult establishments were permitted to locate.[18]

Judge Titone wrote a forceful dissenting opinion in *Town of Islip* in which he: (1) criticized the Supreme Court's decision in *City of Renton*; (2) argued that adult establishment regulations are content-based and can be sustained only by a compelling state interest; (3) urged that content-based regulations cannot "be recast as content neutral" simply because they are motivated by a legitimate governmental purpose;[19] and (4) argued that "public distaste and societal fear of the potential effects of certain speech has never provided sufficient justification to suppress pro-

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Justice Stevens delivered the opinion of the Court in Parts I and II of *Young*. *See id.* at 52. Part III of Justice Stevens's opinion, which contains the major part of the legal analysis, was joined only by Chief Justice Burger and Justices White and Rehnquist. Justice Powell wrote an opinion concurring in the judgment and portions of the opinion. *See id.* at 73. Justice Stewart delivered a dissenting opinion, joined by Justices Brennan, Marshall and Blackmun. *See id.* at 84.

16. City of Renton v. Playtime Theatres, 475 U.S. 41, 43 (1986). Justice Rehnquist wrote the opinion for the Court in *Renton*. *See id.* at 43. Justice Blackmun concurred in the result. *See id.* at 55. Justice Brennan wrote a dissenting opinion, in which Justice Marshall joined. *See id.*

17. Judge Richard Simons wrote the opinion for the court. *See Town of Islip*, 540 N.E.2d at 216. Judges Titone and Kaye wrote dissenting opinions. *See id.* at 226-236 .

18. *See id.* at 218; *Renton*, 475 U.S. at 41; Young v. American Mini Theatres, 427 U.S. 57 (1976).

19. *Town of Islip*, 540 N.E.2d at 226-35.

tected speech."[20] He criticized the majority for not following New York's tradition of offering greater free speech protection under the New York State Constitution than under the federal Constitution.[21] Nevertheless, Judge Titone wrote the majority opinion in *Stringfellow's*, which sustained New York City's ordinance under the free speech clause of the New York State Constitution.[22] His opinion relied heavily on the very *Renton-Islip* principles he had forcefully denounced in his *Islip* dissent and made little attempt to apply an independent state constitutional analysis.[23]

The holding in *Stringfellow's,* that the New York City regulatory scheme does not violate the free speech guarantee of the New York State Constitution, effectively resolved that the city provisions are also in accord with the free speech protections of the federal Constitution. Individual rights guaranteed by the federal Constitution are minima; states can choose to afford greater rights, but they must afford at least the federal constitutional minima. Thus, in construing their state constitutions, state courts can give individuals greater protection than is granted by the federal Constitution, but they can never give less.[24] In fact, the New York State Constitution free speech standards applied in *Stringfellow's* were virtually identical to the governing First Amendment standards.[25] In the

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20. *Id.* at 229.

21. *See id.* at 232.

22. *See* Stringfellow's of New York, Ltd. v. City of New York, 694 N.E.2d 407 (N.Y. 1998).

23. *See infra* notes 46-53 and accompanying text.

24. *See* Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74, 81 (1980).

25. *See* Hickerson v. City of New York, 146 F.3d. 99, 104 (2d Cir. 1998) ("[T]he issues decided and the standards applied by the New York state courts in rejecting plaintiffs' state constitutional challenge are the same that would be applicable to plaintiffs' First Amendment claim."). The circuit court in *Hickerson* held that the New York Court of Appeals decision in *Stringfellow's* precluded the Hickerson plaintiffs, owners and operators of adult entertainment establishments, who were also plaintiffs in the state court *Stringfellow's* litigation, from litigating their federal free speech claims in federal court. *See id.* at 107. In a prior action involving different plaintiffs, the Second Circuit ruled that the City's zoning ordinance did not violate the free speech and equal protection pro-

final paragraph of the decision, the court in *Stringfellow's* stated explicitly that the City's ordinance is not constitutionally objectionable under the standards set forth in *City of Renton* and *Town of Islip*.[26]

The court in *Stringfellow's* found that under *Town of Islip,* the state constitution free speech claim required the determination of three issues: (1) whether the City's ordinance was aimed at the content of materials conveyed by adult establishments, or by quality of life concerns unrelated to speech; (2) whether the ordinance was no broader than necessary to achieve its goals; and (3) whether the ordinance left open reasonable alternative avenues of communication.[27]

The New York Court of Appeals found that the City ordinance satisfied these three requirements. The extensive legislative record, including numerous studies, showed that the City provisions were motivated by the City's desire to combat the negative secondary effects of adult entertainment, including deflated property values, declining neighborhood business, increased crime, and harm to "the economic viability of the community as a whole."[28] The court found that the regulatory scheme was aimed at combating these secondary effects and was not "an impermissible attempt to regulate the content of expression[,]"[29] that it was no broader than necessary to attack the identified community problems, and that it left "ample space" available for adult uses.[30]

The attorneys for the City convinced the New York Court of Appeals that the challenged restrictions properly balance community needs and

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visions of the federal Constitution. *See* Buzzetti v. City of New York, 140 F.3d 134 (2d Cir.), *cert. denied,* 525 U.S. 816 (1998).

26. *Stringfellow's,* 694 N.E.2d at 421.

27. *See id.* at 415-20 (interpreting factors set forth in *Town of Islip* to determine constitutionality of ordinance); *see also* Town of Islip v. Caviglia, 540 N.E.2d 215 (N.Y. 1989).

28. *Stringfellow's,* 694 N.E.2d at 416.

29. *Id.* at 416.

30. *Id.* at 418.

free expression.[31] Perhaps they do. A proper balance depends on an evaluation of the relative weights to be given to the competing free expression and municipal interests. Judges may differ as to whether a particular regulatory scheme adequately reconciles these competing concerns.

The difficulty is that free speech case law governing adult entertainment zoning does not strike anything resembling a proper balance between free speech and municipal concerns. The principles adopted in *Town of Islip* and *Stringfellow's* are based almost entirely on the federal constitutional principles generated by the Supreme Court's decisions in *Young v. American Mini Theatres*, and *City of Renton v. Playtime Theatres*. These principles so heavily stack the deck in favor of municipal control that adult entertainment operators and their patrons have very little chance of succeeding on free speech claims. Although adult entertainment operators around the country have filed numerous First Amendment claims since the Supreme Court's 1976 decision in *Young*, they have prevailed less than twenty percent of the time.[32] Considering that adult entertainment cases involve protected speech, this is a very low rate of success for the assertors of free speech rights.

Adult entertainment cases do not involve sexual material that is within the legal definition of obscenity;[33] material that is obscene is not protected by the First Amendment and thus can be banned by the gov-

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31. In *Stringfellow's*, the Court of Appeals stated that "[i]n this State, the proper balance between community needs and free expression under our Constitution has been delineated in *Town of Islip v. Caviglia*. . . ." 694 N.E.2d at 415.

32. In March, 1998, my research assistant, Stella Lellos, a student at Touro Law Center, analyzed the post-*Young v. Mini Theatres* lower court decisions. She found that 100 lower court decisions decided under *Young-Renton* standards resulted in final decisions for the plaintiff or municipality. The City prevailed in 81 cases, while the adult operators prevailed in 19 cases. Excluded from the analysis were decisions rendered on vagueness grounds. For examples of recent decisions, see *Richland Bookmart v. Nicholas*, 137 F.3d 435 (6th Cir. 1998) (upholding state statute limiting hours of operation and days adult establishments could be open), and *Z.J. Gifts D-2 v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998) (upholding ordinance requiring adult entertainment operators to locate in industrial zones), *cert. denied*, 119 S. Ct. 162 (1998).

33. *See* Miller v. California, 413 U.S. 15 (1973).

ernment altogether.[34] Adult entertainment zoning cases involve sexually explicit expressive material, which receives First Amendment protection. The critical question is "How much protection?"

In *City of Renton*, the Court ruled that zoning ordinances regulating adult entertainment establishments must be supported by a "substantial governmental interest" and "allow for reasonable alternative avenues of communication."[35] Because sexually explicit speech is not at the core of the First Amendment, there is justification for affording it less protection than political speech.[36] In *Young v. American Mini Theatres*,[37] Justice Stevens wrote that although we might well fight to preserve the right to engage in political speech, "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theatres of our choice."[38]

The *City of Renton* substantial state interest-reasonable alternative avenues of communication criteria would thus seem to be appropriate standards for evaluating the constitutionality of restrictions on sexually explicit non-obscene speech. The problem is that the courts' implementation of these standards has failed to give meaningful consideration to the free speech side of the equation.

The Court in *City of Renton* identified two critical issues that must be resolved to determine whether an adult entertainment ordinance satisfies the First Amendment. The first is whether the "predominant purpose" of the ordinance is, on the one hand, to control the content of the messages conveyed through adult entertainment or, on the other, to further the quality of life of the community.[39] This might, at least in theory, be con-

34. *Id.*

35. City of Renton v. Playtime Theatres, 475 U.S. 41, 50 (1986).

36. Regulation of political speech is typically tested under a compelling state interest–less restrictive alternative approach. *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377 (1992); Cohen v. California, 403 U.S. 15 (1971).

37. 427 U.S. 50 (1976).

38. *Id.* at 70.; *see also R.A.V.*, 505 U.S. at 422 (Stevens, J., dissenting) (articulating a hierarchy of speech with political speech at the "zenith" of free speech protection and commercial speech and sexually explicit speech receiving less protection).

39. *Renton*, 475 U.S. at 48.

sidered significant because First Amendment law generally abhors attempts to regulate speech simply because the government disagrees with its content. In *Young*, Justice Stevens stated that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[40]

There are, however, serious difficulties with the Court's focus on "predominant purpose" when adult entertainment ordinances are challenged under the First Amendment. First, there is the usual difficulty of attempting to determine the actual purpose or motive[41] of a multimember legislative body.[42] Second, plaintiffs asserting free speech challenges to adult entertainment regulations have little chance of demonstrating that the local legislative body was motivated by disagreement with the content of adult establishment material.

Municipal officials intent on enforcing an adult entertainment ordinance would not be foolish enough to admit that their purpose for enacting the ordinance was disagreement with the content or messages conveyed by adult entertainment materials. These officials know that they should articulate their purpose in "quality of life" terms, i.e., combating "undesirable secondary effects" of adult establishments. Municipal officials will thus pull out their laundry list and argue that the ordinance is needed to prevent crime, protect retail trade and property values, and preserve the character of the neighborhood.[43]

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40. Young v. American Mini Theatres, 427 U.S. 50, 64 (1976).

41. The Court in *Stringfellow's* referred to legislative "purpose" and "motive" interchangeably. *See* Stringfellow's of New York, Ltd. v. City of New York, 694 N.E.2d 407, 415-16 (N.Y. 1998).

42. In *Stringfellow's*, the court made clear that it is the motive of the legislature, not of individual legislators, that is controlling. *Id.* at 416 (quoting Town of Islip v. Caviglia, 540 N.E.2d 215, 219 n.2 (N.Y. 1989)). Thus, the plaintiff's "reliance on isolated comments from several City Council members and other City officials as evidence of an alleged improper motive to eradicate this form of expression [was] unavailing." *Id.* at 416. On the issue of determining legislative motive, *see* Scott-Harris v. Fall River, 134 F.3d 427 (1st Cir. 1997), *cert. denied*, 523 U.S. 1003 (1998).

43. *See Town of Islip*, 540 N.E.2d at 231 (Titone, J., dissenting) ("It is unlikely that a municipality would explicitly acknowledge a motive to restrict a particular mes-

The courts, in fact, require very little justification from municipalities that assert that they were motivated by a desire to combat the negative secondary effects of adult establishments. In *Stringfellow's,* the City showed that it relied on its own studies of secondary effects as well as the studies of other municipalities.[44] In *City of Renton,* however, the Supreme Court went so far as to rule that a municipality need not even make its own study of threatened secondary effects and can rely upon the experiences of other municipalities. The Court stated the following:

> We hold that [the City of] Renton was entitled to rely on the experiences of Seattle and other cities. . . in enacting its adult zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. . . . Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theatre zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of adult theaters does not call into question either Seattle's identification of these secondary effects or the relevance of Seattle's experience to Renton.[45]

In the context of adult entertainment, the dichotomy drawn by the case law draws between a municipality's disagreement with the message and its desire to promote the quality of life is false and meaningless. Is there any question that adult sex entertainment zoning ordinances are adopted largely because local officials do not like the material sex shops offer? When officials argue that an ordinance was enacted to promote the quality of life of the community, they are really saying they are con-

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sage, and it is all too easy for local legislatures to justify restrictions by verbalizing some legitimate governmental interest in support . . . .").

44. *Stringfellow's,* 694 N.E.2d at 415-16.

45. City of Renton v. Playtime Theatres, 475 U.S. 41, 51-52 (1986).

vinced that the nature of the sex shop material will bring down the quality of life.

The judicial inquiry into municipal motive has an even more fundamental flaw. Adult entertainment ordinances are content-based, singling out adult establishments solely on the basis of the sexually explicit materials they offer to the public.[46] The Supreme Court's reasoning in *City of Renton,* that adult entertainment zoning motivated by a desire to combat secondary effects is not content-based, has been "strongly criticized" by several well-respected legal commentators.[47] Professor Erwin Chemerinsky persuasively argues:

> [t]he *Renton* approach seems to confuse whether a law is content-based or content-neutral with the question of whether a law is justified by a sufficient purpose. The law may have been properly upheld as needed to combat [the negative secondary effects] of adult theaters, but it nevertheless was clearly content-based: It applied only to theaters showing films with sexually explicit content.[48]

Judge Titone got it right in his dissenting opinion in *Town of Islip* when he urged that "the [*Renton*] 'predominant purpose' test represents a mere linguistic device to circumvent the traditional rule that content-based

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46. *See id.* at 55 (Brennan, J., dissenting) ("Renton's zoning ordinance selectively imposes limitations on the location of a movie theater based exclusively on the content of the films shown there.").

47. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES § 11-2, at 760 (1997); *see also* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 952 (2d ed. 1988) ("The *Renton* view should be quickly renounced. Carried to its logical conclusion, such a doctrine could gravely erode the first amendment protections."); Geoffrey R. Stone, *Content-Neutral Restrictions,* 54 U. CHI. L. REV. 46, 116-17 (1987) (*Renton's* "transmogrification" of express content-based regulation into content neutrality threatens First Amendment doctrine. One hopes "that this aspect of *Renton* is soon forgotten.").

48. CHEMERINSKY, *supra* note 47, § 11-2, at 761; *see also Renton,* 475 U.S. at 56 (Brennan, J., dissenting).

regulations be supported by an actual compelling governmental need."[49]

Case law requires that adult entertainment zoning ordinances provide reasonable alternative locations for adult entertainment establishments within the municipality. The courts, however, have asked very little of municipalities in terms of demonstrating the availability of alternative locations. In *City of Renton*, for example, the adult theatres argued that virtually all of the land left open for adult entertainment use either was already used by existing businesses or was not for sale or lease. The Supreme Court was not sympathetic. Justice William Rehnquist stated that adult entertainment operators "must fend for themselves in the real estate market" and that the First Amendment does not compel municipalities to ensure that adult theaters "be able to obtain sites at bargain prices."[50] This hardly seems like an attempt to balance free speech and municipal concerns in a meaningful fashion.[51]

Perhaps what is most disappointing about the decision in *Stringfellow's* is the failure of the New York Court of Appeals to apply an independent state constitutional analysis. The New York Court of Appeals placed almost total reliance on the *Young-Renton* federal constitutional standards in deciding the state constitutional free speech claim.[52] As in *Islip*, the New York Court of Appeals in *Stringfellow's* deviated little from the federal constitutional principles. The court in *Stringfellow's* held that under *Renton* the "Federal constitutional analysis requires examination of the ordinance's 'predominant purpose,'[53] while under *Islip*

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49. Town of Islip v. Caviglia, 540 N.E.2d 215, 231 (N.Y. 1989) (Titone, J., dissenting).

50. *Renton*, 475 U.S. at 54.

51. Of course, as Justice Brennan pointed out in dissent in *Renton*, the adult operators were not arguing that the city was required to "guarantee low-price sites for their businesses, but [sought] only a reasonable opportunity to operate adult theaters in the city." *Id.* at 65.

52. *But cf., e.g.*, City of Portland v. Tidyman, 759 P.2d 242 (Or. 1988) (declining to follow *Renton* and holding adult entertainment ordinance invalid under State constitution).

53. Stringfellow's of New York, Ltd. v. City of New York, 694 N.E.2d 407, 415 (N.Y. 1998).

the state constitutional inquiry focuses on whether there has been "a purposeful attempt to regulate speech."[54] This is a rather insignificant distinction. The court in *Stringfellow's* acknowledged that "the difference in verbiage does not significantly affect the outcome, since it is apparent from the [City ordinance's] legislative history that ameliorating the negative social consequences of proliferating adult uses was the City's *only* goal."[55]

In *Town of Islip*, both the majority and dissenting opinions referred to New York's "long history and tradition of fostering freedom of expression, often tolerating and supporting works which in other States would be found offensive to the community."[56] Among the decisions the majority and dissent cited to support this history and tradition was *People ex rel. Arcara v. Cloud Books*.[57] In that case, after the United States Supreme Court found that a state court order closing a bookstore as a public nuisance because some patrons were using the premises to commit illegal sex acts did not violate the free speech guarantee of the Federal Constitution,[58] the New York Court of Appeals found that the order violated the free speech protection of the New York State Constitution. The New York Court of Appeals ruled that to obtain a closure order under the state constitution, the government must demonstrate that it cannot accomplish its purposes through other means, such as by arresting the offenders or granting injunctive relief. The New York Court of Appeals in *Arcara* stated that the "crucial factor in determining whether state action affects freedom of expression is the impact of the action on the protected activity and not the nature of the activity which prompted the government to act. The test . . . is not who is aimed at but who is hit."[59] This is directly contrary to *Stringfellow's* focus on the government's purported

54. *Id.*

55. *Id.* (emphasis added).

56. Town of Islip v. Caviglia, 450 N.E.2d 215, 221 (N.Y. 1989) (majority); *id.* at 226 (Titone. J., dissenting); *see also id.* at 232 (Titone. J., dissenting, citing several Court of Appeals State Constitution free speech decisions).

57. 503 N.E.2d 492 (N.Y. 1986).

58. *See* Arcara v. Cloud Books, 478 U.S. 697, 707 (1986).

59. *Arcara*, 503 N.E.2d at 492.

goal of curbing the secondary effects of the adult entertainment material rather than on what is hit—sexually explicit materials of adult entertainment operators. The striking contrast between *Arcara* and *Islip-Stringfellow's* has led a leading expert on the New York State Constitution to conclude that "*Stringfellow's* established . . . what Judges Kaye and Titone understood in *Islip*—that *Arcara* is no longer good law."[60]

It is easy to find support for municipal attempts to drive the sex shops out of town. After all, who wants to support sleaze? But at the heart of freedom of speech is its protection of expression the majority finds offensive, distasteful, and even vulgar. The free speech interests of those who trade in sexually explicit materials, as well as those who consume it, must be taken into account, and in a meaningful way.

Over twenty-five years ago Vietnam war protestor Paul Cohen was convicted for wearing a jacket bearing the words "Fuck the Draft" inside a Los Angeles courthouse. The Supreme Court in *Cohen v. California*[61] ruled that Cohen's conviction violated the First Amendment. However distasteful, the message on Cohen's jacket was protected speech. Justice Harlan wrote that because "one man's vulgarity is another's lyric," our Constitution leaves matters of taste and style largely to the individual, not to governmental officials.[62] Those who found Cohen's jacket offensive "could effectively avoid further bombardment of their sensibilities simply by averting their eyes."[63] Unfortunately, the United States Supreme Court neglected these bedrock principles of freedom of expression in *Young* and *Renton*, and the New York Court of Appeals has now followed suit in *Stringfellow's*.

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60. Vincent Martin Bonventre, *Many Constitutional Challenges Fail*, N.Y.L.J., Oct. 5, 1998, at S3.

61. 403 U.S. 15 (1971).

62. *Id.* at 25.

63. *Id.* at 21.